

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA**

ELIZABETH SINES ET AL.

Plaintiffs,

v.

JASON KESSLER ET AL.

Defendants.

: Case No. 3:17-CV-00072

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: (Judge MOON)

: (Magistrate Judge HOPPE)

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**DEFENDANTS' RESPONSE IN
OPPOSITION TO MOTION IN
LIMINE REGARDING CORPORAL
STEVEN YOUNG**

**I. Corporal Young cannot properly be excluded from testifying about the police
failure to find evidence of anyone else conspiring with James Fields**

Plaintiffs seek to exclude any testimony or argument regarding law enforcement's failure to locate evidence of James Fields's communications with any possible co-conspirator. Plaintiffs allege that the testimony would be prejudicial "negative evidence." The Court must overrule this request of the Plaintiffs.

First, the plaintiffs do not, because they cannot, present any precedent for excluding testimony due to a failure to lay a foundation *at deposition* where a witness will be available to testify *at trial*. Neither has defendants' research discovered any such case.

Second, plaintiffs own case citations contradict the idea that Corporal Young's testimony can be limited via a motion *in limine*.

In United States v. Ebert the Fourth Circuit found that negative evidence elicited without a proper foundation laid *at trial* should have been held inadmissible. U.S. v. Ebert 1999 U.S. App. LEXIS 8453 at 46.

In Jones v. Pak-Mor Mfg. Co., 145 Ariz. 121, 700 P.2d 819 (1985) similarly found that where negative evidence, without a proper foundation *at trial* to be excludable as prejudicial. Id. at 126. Not only did the Jones Court not deal with a motion *in limine* but it observed that a large part of the reason negative evidence requires a proper foundation is that the opposing party will often have an “inability to meet the evidence”. Here, the plaintiffs’ own motion demonstrates in exquisite detail all the ways they have available to counter Corporal Young’s testimony.

In Forrest v. Beloit Corp. 424 F. 3d 344 (3rd Circ. 2005) the Court once again dealt with a failure to lay an adequate foundation at trial for negative evidence. Id. at 356-358. The Forrest Court specifically did not hold that the deficient evidence should have been excluded pre-trial but did engage in an extended discussion of why the foundation attempted *at trial* was insufficient to properly admit the testimony.

Plaintiffs own motion, then, opposes the idea that the Court should grant this motion pre-trial.

Third, the Plaintiffs have conjured up a straw Defendant who seeks to “make the **sweeping assertion**that Fields *never* communicated with any rally attendee or event organizer of the Battle of Charlottesville.”¹ But nothing the defense asked of Corporal Young at deposition could possibly lead to this assertion. Defendants, in fact, did a decent job of laying the necessary foundation for the questions they actually asked.²

¹ Plaintiffs’ motion ECF 1153 at p. 6

² Deposition of Steven Young at p. 30; 36-37.

Conclusion

Plaintiffs have failed to establish they are entitled to their requested relief. The plaintiffs' motion *in limine* regarding the testimony of Steven Young or any other law enforcement must therefore be overruled or reserved until defense fails to lay a proper foundation at trial.

Respectfully Submitted,

s/James E. Kolenich

James E. Kolenich
KOLENICH LAW OFFICE
9435 Waterstone Blvd. #140
Cincinnati, OH 45249
(513) 444-2150
JEK318@gmail.com

s/Elmer Woodard

Elmer Woodard
5661 US Hwy 29
Blairs, VA 24527
isuecrooks@comcast.net

*Trial Attorneys for Jason
Kessler, Nathan Damigo, and
Identity Evropa*

CERTIFICATE OF SERVICE

I certify the above was served on OCTOBER 12, 2021 on all ECF participants and that parties requiring service by other means were served as follows:

Robert Ray
azzmador@gmail.com
Vanguard America c/o Dillon Hopper
dillon_hopper@protonmail.com

Elliott Kline *eli.f.mosley@gmail.com*
deplorabletruth@gmail.com Matthew Heimbach
matthew.w.heimbach@gmail.com
Richardspencer@gmail.com
Christopher Cantwell
#00991-509
USP Marion
4500 Prison
Rd.
PO Box 2000
Marion IL 62959

Respectfully Submitted,

s/ James E. Kolenich